No. 2396

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION
a corporation
Appellant
vs.
H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE
Appellees

Appeal from the United States District Court for the Western District of Washington, Southern Division

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Hon. George Donworth, Judge
Hon. Edward E. Cushman, Judge

Petition for Rehearing

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Having carefully examined the opinion of the honorable court, we think that with propriety we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellees on the following grounds:

I.

The first issue to which we respectfully direct the court's attention is involved in the third question

decided by the court, which was: Did the court have equitable jurisdiction of the case by reason of having acquired jurisdiction of the person of the defendants? The court has answered this question in the negative. This answer is based upon the assumption that a court of equity has not the jurisdictional power to abate a nuisance existing in a foreign jurisdiction and cannot indirectly do so by virtue of acting *in personam* through its personal control of the parties.

First, we respectfully submit that the presumptions, if any, should favor the view that the lower court had jurisdiction. This case can be said to stand, in justice to all parties concerned, in a different light than a case in which, with knowledge of jurisdictional or territorial limits, equitable relief of an extra-territorial nature was sought and allowed. These defendants, through a mistake not of their own making, were enjoined by this court and by virtue of its decree were for years prevented from enjoying their legal rights to their damage in the amount of $22,083.00. Under these circumstances, it would not seem unreasonable that the plaintiff, having invoked that jurisdiction originally, should be held to be estopped to question that jurisdiction, and authorities hereinafter cited justify such an estoppel. Certainly the defendants in this case have suffered no inconsiderable hardship by virtue of this mistake, and for this reason, unless it is certain that the action of the court was absolutely

ultra vires, and unless it can be said that it was not a jurisdictional question in the decision of which an equity court might have some latitude for discretion, we respectfully submit that in this case the jurisdiction of the lower court should be upheld. We believe that the considerations hereinafter suggested justify the conclusion that the lower court had jurisdiction.

We call attention to the fact that in its treatment of the jurisdictional question this court has regarded it as a case wherein the trial court was asked to assume jurisdiction only to abate a nuisance and to protect rights in real property. We submit that the relief claimed was of a broader scope and that under the pleadings in this case an equity court could have granted relief of a different nature. A consideration of the pleadings shows that it is true that the plaintiff in its Amended Complaint (Transcript, pages 15, 16) asked for the abatement of a nuisance and the protection of real property rights. An examination of the defendants' Cross-Bill and Complaint (Transcript, pages 73, 92), however, shows that injunctive relief was asked protecting the right of the defendant McGowan to exercise in these waters the public right of fishery, regulated as it was by the state that $20,000.00 damages were asked and such other relief in the premises as the nature of the case might require, or as should be just. Similar relief was asked in the Supplemental

Cross Bill which was filed in 1910 (Transcript, page 162).

That the public right of fishery is a personal privilege and a right of citizenship belonging to the members of the general public and thus distinguished from a real property right is demonstrated by the case of *Hume v. Rogue River Packing Co.,* 51 Ore. 237, 250. The fact that the state has regulated the public right of fishery by virtue of its police power does not affect the proposition that it is a public right. The right to damages for infringement of such a personal right is certainly a transitory matter.

As is suggested, the decision of this court seems to be predicated upon a narrower idea of the controversy before the court and the relief prayed for than the pleadings justify, and its conclusion is founded on the idea that an equity court cannot abate a nuisance in a foreign jurisdiction, or abate conditions constituting an interference with rights in real property.

We respectfully call the court's attention to the fact that the cases, cited as authority in the opinion, are cases in which the court objected to allowing affirmative relief to protect foreign real estate, and that an action for an accounting was not concerned. The case of *Gilbert v. Moline Water Power and Mfg. Co.,* 19 Ia. 320, and cited on page 21 of the typewritten copy of the court's decision, is a case

of this kind, wherein the court was asked to abate a nuisance, that is, to grant relief requiring affirmative action by the officers of the court at a point beyond the territorial jurisdiction of the court; that the relief required affirmative action, and action *in rem,* and that the impossibility of the officers of the court taking affirmative action *in rem* at a point outside of the court's territorial jurisdiction, was the consideration which determined the court's decision, is shown by the following dicta quoted on page 23 of the typewritten copy of the decision: "And this conclusion is more warrantable when we consider that in this case the main dam extends from the main shore to the island (Rock Island); that this island contains hundreds of acres of land, is indisputedly a part of the territory of our sister state, and *that to reach this obstruction or nuisance, our courts and the officers thereof must go beyond this island and decree and procure the removal of a work attached to the main shore,* * * *."

The case of *Miss. & Mo. Ry. Co. v. Ware,* 67 U. S. 485, a case in which three judges of the Supreme Court dissented, is a similar case. The court in the part of the decision quoted on page 23 of this court's opinion pointed out in a paragraph found on page 24 that the action was a proceeding *in rem,* saying: "It was at the long pier and in the Illinois draw east of that pier that the complainant's boats sustained the injuries on which he founded his

rights to sue the Iowa corporation *and to proceed against the bridge in rem as a public nuisance.*" In this case it is particularly pointed out in the opinion of Mr. Justice Catron that no damages were sought and that the plaintiffs asked nothing from the person of the defendant. The general language cited from the work of Mr. Pomeroy, Sec. 1318, seems to be based upon this case of *Miss. & Mo. Ry. Co. v. Ware.*

We respectfully submit that there is and should be a clear distinction between cases where a court is asked to grant affirmative relief requiring its officers to go into a foreign jurisdiction and requiring action *in rem* and which primarily involve real property, and a case where an equity court having personal jurisdiction of the defendant is asked to protect a right which is an incorporeal right, or a right of citizenship, by restraining present and future action, and wherein the court is asked to give a personal judgment for damages. Unlike cases of the former kind, the case at bar involved a cause of action which was transitory, and the decree of the court given by virtue of its power *in personam* over the parties before the court did not require affirmative action of the court or its officers in territory beyond the jurisdictional limits of the court, nor was it an action *in rem.*

We respectfully call the court's attention to the following authorities which establish that in cases similar to the case at bar an equity court has com-

petent jurisdiction whereby it may give a remedy, not by granting affirmative relief but by *restraining* the person of the defendant, and that the court, in the case at bar, from the standpoint of the true theory of equity, could restrain the acts complained of, even though it be admitted, for the sake of argument, that these rights, which were thus protected, stand upon the same plane as rights in real property.

Jennings Bros. Co. v. Beale, 27 Atl. 948, is a case in which a Pennsylvania equity court was held to have jurisdiction to restrain trespass to lands not within its territorial jurisdiction.

In *French v. McGuire,* 55 How. Pr. (N. Y.) 471, a New York court at the complaint of a citizen of New York and having personal jurisdiction of the defendant, restrained him from performing or exhibiting a drama in San Francisco.

In the case of *Louisville, etc., Co. v. Western Union Tel. Co.,* 207 Fed. 1 (C. C. of A., 6th Circ.), it was held that a federal court in Kentucky had jurisdiction to enjoin the defendant from interfering with the operation of certain telegraph lines on rights of way in other states. The court held that the equitable principle allowing equity courts to require or enjoin acts done in foreign jurisdictions does not apply only in cases of fraud, trust and contract, but that this jurisdiction is of broader scope, and cites the decision of *Philadelphia Co. v. Stimson,* 223 U. S., page 623, as authority.

In *Great Falls Mfg. Co. v. Worster,* 23 N. H. 462, it was held in a case which thoroughly discusses the equitable principles involved, that where the defendant was within the jurisdiction of the court, he might be enjoined from destroying a dam in the State of Maine, on the theory that since the defendant was within the limits of the court and subject to its jurisdiction, he could be forbidden to go elsewhere and commit an injury to property there situated.

In *Alexander v. Tolston Club,* 110 Ill. 65, 77, it was held that an Illinois court could prevent the defendant from interfering with a right of way claimed over lands situated in Indiana, the court having personal jurisdiction of the defendant.

In *Schmaltz v. York Mfg. Co.,* 53 Atl. 522 (Penn.), it was held that a Pennsylvania court could restrain the removal of a brewery situated in New York.

In *Kirklin v. Atlas Savings and Loan Association,* 60 S. W. 149, it was held that an equity court in Tennessee had jurisdiction to restrain an interference with lands or with personal property situated without the state, by virtue of the court's power over the person of the defendant.

In *Frank v. Payton,* 82 Ky. 150, it was held that an equity court in Kentucky could restrain the defendant of whom it had personal jurisdiction from conveying away lands situated in Illinois.

Cole v. Cunningham, 133 U. S. 107, 33 Law. Ed. 539, establishes the jurisdiction of a chancery court to restrain the commencement of a suit in another jurisdiction, citing a variety of American cases on this general proposition and announcing that the settled rule of American and English jurisprudence sanctions such action.

In the case of *Munson v. Tyron,* 6 Phila. 395, it was held that a court might restrain a trespass to a coal mine outside the jurisdiction of the court, the court saying that there was a clear distinction between cases requiring affirmative action and cases wherein the court by acting upon the conscience of a person before it, by granting relief of a negative character, could restrain acts involving rights to property located in a foreign jurisdiction.

Such cases as have refused to allow an equity court to restrain a trespass to foreign real estate are based upon the analogy of trespass actions in law. We submit, first, that an action should lie at law for trespass to realty; and second, that even were this not true, that there is no reason why equity should follow the analogy of the law procedure.

The doctrine that an action *at law* will not lie for injuries to foreign real estate is an old doctrine and one which is a part of the common law simply by virtue of the fact that it is an aged precedent. Attention is called to the very early case of *Livingstone v. Jefferson,* Fed. Case 8411, 1 Brock, 203,

in which Mr. Justice Marshall, as a circuit judge, renders an opinion in a case involving the question of whether or not an action in law lies for a trespass to foreign realty. He was of the opinion that the only justification for holding that an action or trespass would not lie was that it was established by authority. He argued against the rule, showing that it was purely technical, founded on no sound principle, and often resulted in defeating justice, and reciting that Lord Mansfield had made a vain endeavor to abolish the rule in English jurisprudence. By the English judicatory act of 1873, which abolished the distinction between local and transitory venues, the rule has been abolished. This criticism of the rule by Lord Mansfield and Chief Justice Marshall has received approval in certain American courts, which have allowed an action for foreign trespasses, a leading case upon the question being the case of *Little v. The Chicago, etc., Ry. Co.*, 67 N. W. (Minn.), 846, a case in which the question receives careful and illuminating consideration and in which it is demonstrated that there is no reason why there should be a distinction between a tort committed to a person and a tort involving rights in real property.

Under these circumstances, what reason is there for holding that the equity court in the case at bar was not of competent jurisdiction, when that holding is to be based upon an analogy of the law which on eminent authority has no foundation in princi-

ple and is the law of the land simply by virtue of the fact that its precedents are old and long established? Is there any possible or reasonable distinction between the long line of cases which have held that a person under the duty of actual trust or by virtue of a constructive trust arising from fraud can be compelled by an equity court, acting *in personam,* to convey land located in a foreign jurisdiction, and a case where the court is asked to restrain the defendant from doing acts in a foreign jurisdiction which injures property there situated?

In relation to this distinction, the case of *Louisville, etc., Co. v. Western Union Tel. Co.,* 207 Fed. 1, at page 6, said:

> "Appellant contends that this principle applies only to cases of fraud, trust and contract, and so is without application here. * * * But we have found nothing in any of the cases to which our attention has been called limiting the jurisdiction to such cases. On the other hand, there is no apparent reason for such limitation. Indeed, in *Philadelphia Co. v. Stimson,* 223 U. S. at page 623, 32 Sup. Ct. 345, 56 L. Ed. 570, which was not a case of fraud, contract or trust, the Supreme Court of the District of Columbia was expressly held, upon a bill filed to set aside certain harbor lines in the harbor of Pittsburgh, Pa., to have jurisdiction to restrain the Secretary of War from causing a criminal proceeding to be instituted

against complainant because of the reclamation and occupation of its land outside the prescribed limits."

It is submitted that in accordance with the view of Chief Justice Marshall and Lord Mansfield, there is no logical reason why a law court should not give damages for a foreign tort involving real property just as it does where personal rights are involved. It is submitted that in accordance with the authorities herein referred to, there is no logical reason why an equity court which admittedly has the right to restrain or to enforce action on the part of one under a trust relationship as to foreign realty, should not restrain action where damage is threatened to real property rights existing in a foreign jurisdiction, and in the case at bar, looking at it in the narrow aspect of simply a case to restrain a trespass to foreign lands, it is submitted that the reasonable holding of this court should be that the lower court had jurisdiction.

Whatever may be the ultimate view of this court on the question of the right to restrain injuries to foreign real estate, in the case at bar there was protection asked for incorporeal and personal fishing rights, which are rights of citizenship. Damages were also asked. The cases refusing injunctive protection of foreign real estate follow the analogy of a rule of law. This rule of the law is unjust and highly technical, and equity courts have rightly refused to follow it. Therefore,

in the case at bar this court, in reviewing the decree of an equity court involving other rights than those of real property, is justified in not following such precedents, particularly when, by the best reasoned cases, those precedents have not been followed, even in cases involving real property. The jurisdiction of the lower court, in view of the great injustice to these appellees of dismissing them without redress for the losses arising from the deprivation for four years of their property rights, should be upheld where rights other than real property rights were before the lower court and where damages were allowed.

Attention is called to this distinction. The question in this case is not whether it is expedient for an equity court to do what this court did. The question is, did it have the power? Thus any arguments which go to the question of expediency from grounds of policy or otherwise of the court's exercise of extra-territorial authority, are not in point.

II.

It is respectfully submitted that when the appellant has invoked the jurisdiction of an equity court and has for years effectively deprived the appellees of their legal rights, that the appellant cannot now be heard to deny that the court had jurisdiction, when that denial is made for the purpose of evading the court's decree entered in an

effort to redress the wrongs thus suffered by the appellees. The attention of the court is again directed to the argument on page 33 of the appellees' brief and to the following authorities, in which an estoppel has been held to exist in similar circumstances:

In *Cumberland Coal Co. v. Hoffman S. C. Co.,* 39 Barb. 16, 15 Abb. Pr. 78, the court held that want of jurisdiction over the subject-matter of the action did not deprive the defendant of the right to damages upon the injunction undertaking when the injunction was dissolved.

In *Adams v. Olive,* 57 Ala. 249, it was held that the party obtaining an injunction will not be allowed to take advantage of their own wrong to be relieved from the obligation of their bond in case the injunction proved to have been issued without jurisdiction.

The same doctrine was applied in the following cases:

Walton v. Develing, 61 Ill. 207.

Hanna v. McKenzie, 5 B. Mon. 314; 43 Am. Dec. 122.

It would seem that the standing of a case which has been removed to the U. S. Court is substantially the same as one originally commenced in that court. In such cases it is uniformly held that after a case has been removed upon the petition of the defendant that thereinafter he is estopped to

claim that the federal court has no jurisdiction: *Mastin v. Chicago, R. I. & P. R. R. Co.,* 123 Fed. 827; *Cowley v. Nor. Pac. Co.,* 159 U. S. 570, 40 L. Ed. 263; *Fisher v. Shropshire,* 147 U. S. 133, 145, 37 L. Ed. 109.

III.

Through inadvertence the mandate of this court was issued to the lower court during a pendency of this petition for a rehearing. This mandate has since been returned by the clerk of the district court. The following citations of authority demonstrate that the mandate may be recalled and that the power is in this court to vacate, alter or amend its decree during the term at which it was made:

Bronson v. Schulter, 104 U. S. 410, 26 L. Ed. 797.

In this case the Supreme Court, speaking through Mr. Justice Miller, announces that it is a general rule of law that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court, which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated or modified by that court. This case seems to be the leading case upon the question and has been followed generally by the federal courts. Attention is called to the following decisions:

Waskey v. Hammer, 179 Fed. 273 (C. C. of A, 9th Circ. 1910).

Miocene Ditch Co. v. Campion Mining and Trading Co., 197 Fed. 497 (C. C. of A., 9th Circ. 1912).

Peabody v. City of Edmonds, 131 Pac. (Wash.) 250.

An examination of these cases shows that it is immaterial that the mandate has been entered of record. To this effect see *St. Paul Fire and Marine Ins. Co. v. Peck,* 139 Pac. 117 (Wash.), where the mandate had been entered of record, and execution had issued.

Wherefore, upon the foregoing grounds, these appellees and petitioners respectfully pray this honorable court to grant to them a rehearing of the said cause.

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Solicitors for Appellees.

I, ..., of counsel of appellees herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

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